



Transgender  
Equality  
Network  
Ireland

# Submission to the Convention on the Constitution: Provision for same-sex marriage

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## EXECUTIVE SUMMARY

In Ireland there are many different types of families that exist. However, not all of these families can avail of the same legal rights. TENI believes that Ireland should give LGBTI people the right to marry as an issue of equality.

Transgender<sup>1</sup> and intersex<sup>2</sup> people face particular challenges in Irish society and are not legally recognised by the State. Proposed recommendations for gender recognition legislation may force transgender people to get divorced before they can be recognised. TENI suggests that to ensure all individuals and families are protected by the Constitution marriage should be defined as between any two people over the legal age of consent rather than focusing on defining sexes. In this way, all Irish citizens can truly be held equal before the law.

TENI calls on Convention members to use this historic opportunity to vote in favour of marriage equality in Ireland.

## ABOUT TENI

TENI is a non-profit member-driven organisation that was founded in 2005. TENI seeks to improve the situation and advance the rights and equality of transgender (herein trans) people and their families. Our Vision is an Ireland where trans people are understood, accepted and respected, and can participate fully in all aspects of Irish society. Ireland remains a place where it can be difficult for trans people to lead safe, healthy and full lives. TENI is dedicated to ending transphobia, including stigma, discrimination and inequality.

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<sup>1</sup> The term transgender or trans refers to individuals whose gender identity is different from the sex assigned at birth.

<sup>2</sup> The term Intersex is used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male.

## INTRODUCTION

TENI welcomes the opportunity to submit to the Constitutional Convention on the issue of marriage equality. This is a great opportunity to progress rights for lesbian, gay, bisexual, transgender and intersex<sup>2</sup> people in Ireland. We call on members of the Convention to recommend to Government that full marriage equality is provided for in Ireland.

The following sections of our submission will outline:

1. Current situation for LGBTI People in Ireland
2. Gender Recognition in Ireland
3. Forced Divorce
4. Intersex People
5. Conclusion

## 1. CURRENT SITUATION FOR LGBT PEOPLE IN IRELAND

As the law currently stands, there is a ban on same sex marriage. Marriage between same sex couples is expressly prohibited by s.2(2)(e) of the Civil Registration Act, 2004.

At present, Irish law divides people into two categories: male and female (Civil Registration Act, 2004, Schedule 1). However, nowhere in legislation are these terms defined. Nor is it clearly explained whether an individual must be male in order to be legally recognised as a man. The difficulty arises because at present marriage in Ireland is only available to opposite sex couples. Same-sex couples can formalise their relationships by Civil Partnership which does not enjoy the same status as marriage (Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010). There are over 169 rights available in a civil marriage that are lacking in a civil partnership, including the lack of any substantial rights for LGBT parents and their children. Furthermore there is ambiguity as to the legal status of intersex people as there is a possibility that

they would not be recognised as either male or female and so would not have the right to marry anyone at all.

## 2. GENDER RECOGNITION IN IRELAND

Transgender people are not legally recognised in Ireland. This is despite the landmark 2007 High Court case that found the State to be in breach of its positive obligations under Article 8 of the European Convention on Human Rights (ECHR) in failing to recognise Dr Lydia Foy in her female gender and provide her with a new birth certificate. Nonetheless, transgender people are active and contributing members of Irish society. They are important members of families – partners, parents, siblings and children. In a recent Mental Health and Well-being Survey conducted with transgender people in Ireland, 41% of respondents reported being in a relationship.

Ireland is due to introduce legislation to recognise the legal gender of transgender people. In 2010, the Gender Recognition Advisory Group (GRAG) was formed to advise the Minister for Social Protection on the legislation that was required to recognise trans people. The final report was published in 2011 and recommended the creation of a scheme wherein transgender applicants who meet certain conditions should be allowed to access a gender recognition certificate. One of the conditions recommended by the GRAG was that *applicants should not, at the time of the application for a gender recognition certificate, be married or in a civil partnership.*

The reasoning behind this was that recognising the gender of a transgender person in a marriage may have the effect of creating a same sex marriage which could then be vulnerable to constitutional challenge. Equally, recognising the gender of a transgender person in a civil partnership was noted in the report of the GRAG to result in two persons of the opposite sex being in a civil partnership. The report stated that *“Such a scenario would effectively result in a state-recognised opposite sex relationship that does not benefit from*

*the full protection afforded to marriage.”* This statement alone shows the discriminatory nature of the current provisions for the recognition of same sex relationships in Ireland in acknowledging that the law currently sees civil partnerships, and therefore same sex relationships, as inferior to heterosexual marriage. This in itself could be seen as unconstitutional given that Article 40.1 states that *“All citizens shall, as human persons, be held equal before the law.”*

### 3. FORCED DIVORCE

**“Requiring divorce before the true gender can be recognised is harmful, and has a negative impact on children - both in terms of their rights and their relationships with their parents.”**

-Thomas Hammarberg, former Commissioner of Human Rights for the Council of Europe  
(Published in *Equality and Identity: Transgender Experiences in Ireland*, TENI, 2013)

**“So I ask you, what of my family? Does Government have no obligations to us? Is my family not also entitled to the full protection of the Irish Constitution? Why should anyone be forced to choose between family and basic human rights?”**

- Victoria Mullen, married transgender woman (Testimony before the Joint Oireachtas Committee on Social Protection and Education, 5 December 2012).

If the GRAG’s proposals become law a trans person in an existing marriage or civil partnership will be forced to divorce their spouse before they can apply for legal recognition of their true gender.

The exclusion of those applicants who are married or in a civil partnership raises clear Constitutional questions. It is arguable that to effectively mandate that a happily married couple divorce prior to granting recognition is a direct interference with the special Constitutional position of the family based on marriage contained in Article 41.3.1.

The situation is further complicated by the provisions governing divorce in Ireland. As enshrined in Article 41.3.2(i), to be granted a divorce, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years prior to the commencement of proceedings. Furthermore, under Article 41.3.2(ii) in order to grant a divorce there must be no reasonable prospect of reconciliation between the spouses. The proposal that recognition only be extended to single persons together with the provisions governing divorce combine to create a situation which is very invidious. Essentially, it requires a trans spouse to apply for a divorce against their wishes, and where the marriage has not broken down, as a condition of recognising their preferred gender. This would be a clear violation of the pledge contained in Article 41.3.1 of the Constitution 'to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack' as the couple would presumably be in a validly contracted and subsisting marriage.

To force a couple to divorce would also constitute an interference with the rights of the non-trans spouse who wants to continue in the marriage. It is also debatable whether a divorce could ever be granted to such a couple as there has been no irreconcilable breakdown of the relationship. Thus married trans people remain caught in a quagmire where, potentially, they can never be recognised in their preferred gender. This is a problem that could be completely eliminated by the immediate introduction of full marriage equality.

#### 4. INTERSEX PEOPLE

Any discussion of fully inclusive marriage equality must also take into account the legal position of people who are intersex. These people are particularly vulnerable as they can be found in law to be neither full male nor fully female and therefore excluded from being able to marry anybody of either sex. This was seen in the Australian legal case in the marriage of C and D (falsely called

C) 1979. In this case the marriage was annulled as, because of D's intersex condition, he was not considered to be 100% male and therefore not entitled to enter into a marriage with a woman.

It is important therefore, to consider the language that any legislation for fully inclusive marriage equality will take. In order to protect Irish intersex people from ending up in a situation where they are seen as neither "same sex" nor "opposite sex" TENI suggests that marriage should be defined as between any two people over the legal age of consent rather than focusing on defining sexes. In this way, all Irish citizens can truly be held equal before the law.

## 5. CONCLUSION

In Ireland there are many different types of families that exist. However, not all of these families can avail of the same legal rights. TENI believes that Ireland should give LGBTI people the right to marry as an issue of equality. This would also safeguard the human rights of transgender and intersex people who are currently within marriages and would ensure that their Constitutional rights would not be infringed. We urge the Convention to vote in favour of marriage equality.